E.I. Dupont de Nemours & Company *and* Buffalo Yerkes Union. Case 3–CA–17273

July 29, 1994

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS DEVANEY AND COHEN

On May 26, 1993, Administrative Law Judge James L. Rose issued the attached decision finding that the Respondent unlawfully denied an employee his right to request the presence of his union representative during an interview which he reasonably believed may lead to discipline. The Respondent filed exceptions only to the wording of the Order and notice. The Respondent argues inter alia that the Order and notice erroneously suggest that the request for a union representative can be made by the Union rather than the employee.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief. We find merit in the Respondent's exceptions and shall modify the recommended Order and notice accordingly. In all other respects, we affirm the judge's rulings, findings, and conclusions.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, E.I. Dupont de Nemours & Co., Buffalo, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(a).

''(a) Denying to an employee, who is the subject of an investigation which the employee reasonably believes might lead to discipline, his right to be represented by the Buffalo Yerkes Union on the request of the employee.''

2. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT deny to our employees, who may be the subjects of an investigation which they reasonably believe might result in discipline, the right to be represented by the Buffalo Yerkes Union on the request of the employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

E.I. DUPONT DE NEMOURS & COMPANY

Doren G. Goldstone and *Rafael Aybar, Esqs.*, for the General Counsel.
Charles E. Mitchell, Esq., of Wilmington, Delaware, for the Respondent.

DECISION

STATEMENT OF THE CASE

JAMES L. ROSE, Administrative Law Judge. This matter was tried before me on March 24, 1993, at Buffalo, New York, on the General Counsel's complaint which alleged that the Respondent refused to allow an employee to be represented by his labor organization during an investigation which might have led to discipline. Therefore, the Respondent violated Section 8(a)(1) of the Act.

The Respondent generally denied that it committed any unfair labor practice and specifically contends that the employee in question did not request representation.

On the record as a whole, including briefs and arguments of counsel, I hereby issue the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent is a Delaware corporation with facilities throughout the United States, including one at Tonawanda, New York, where it is engaged in the manufacture of tedlar film and corian products. The Respondent annually receives directly from points outside the State of New York goods valued in excess of $50,000. The Respondent admits, and I find, that it is an employer engaged in interstate commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The Charging Party, Buffalo Yerkes Union (the Union), is admitted to be, and I find is, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICE

A. *The Facts*

For some years the Union has represented the Respondent's employees at the ''Yerkes'' plant (named for a former employee). Although the collective-bargaining agreement is not in evidence, there is no dispute that pursuant to its terms, employees who are union representatives can be released from work in order to conduct union business, including the representation of employees during meetings leading to discipline.

Gregory Luly is a control mechanic who has worked for the Respondent 18 years. On June 17, 1992,[1] while attempting to hide the tool cart of a fellow employee (an admitted act of horseplay), Luly seriously injured a finger. He was taken to the hospital to have his finger repaired.

The next morning he reported for work at 7:30 a.m. and was taken by his immediate supervisor, Mike Bognar, to the office of Paul Brown, the area superintendent for maintenance in Corian. Luly was questioned about the accident and then Brown, Bognar, and Luly went to the sludge room where it had occurred. They returned to Brown's office about 9 a.m.

In essence, Luly had maintained that the accident happened while he was getting ready to do work in the sludge room. Brown did not really believe Luly and was suspicious that Luly had been involved in some kind of horseplay. In any event, Brown was not satisfied that the injury happened as Luly had described.

Luly testified that when he learned that he was to report to Brown's office, he told fellow employee Dan Pierce ''to get a hold of the union for me.'' And he testified that during his initial meeting with Brown and Bognar he requested union representation and Brown had directed Bognar to contact the supervisors of the union representatives. That he made such a request, or that a call was made to secure the presence of union representatives was denied by Brown and Bognar.

Luly testified that when he and Brown returned from the sludge room, in Brown's office were union representatives Albert Moore (the president) and James Gant[2] (maintenance representative of the tedlar control group), along with Bogner. Luly, Moore, and Gant testified that the five met for about 45 minutes, then Brown announced that he wanted to go back to the sludge room and have Luly reenact what happened. They testified that Moore and Gant asked to be present and Brown told them he would find out if they could. Luly, Moore, and Gant then went to the union office and a short time later Moore received a phone call from Brown, the essence of which was that Moore and Gant would not be allowed to go on the second trip to the sludge room. And in the hallway Brown told them that their presence was not necessary as he was merely investigating how the accident happened.

Brown and Bogner testified that Luly never requested union representation. Further, Moore and Gant appeared outside Brown's office about 9 a.m. but were not involved in the meeting, though Brown spoke with them briefly, and admits that at some point they asked to represent Luly.

The principal conflict between witnesses for the General Counsel and the Respondent is whether Luly requested that the union represent him and whether Moore and Gant participated in the meeting at Brown's office before the second trip to the sludge room.

Moore and Gant are employees. In order to do union business on company time, they must be released by their respective supervisor. Moore testified that he was informed of the meeting to be held at Brown's office at 10 a.m. by his supervisor, Uland Gladden. Similarly, Gant testified that his supervisor, Bob Woolcott, told him to report to Brown's office for the meeting.

After the second trip to the sludge room, Brown determined that Luly had been injured as a result of horseplay, told him he had better seek representation by the Union, and set a disciplinary meeting for the next day. In fact Luly ultimately admitted having been involved in horseplay and was given a 1-year disciplinary probation.

B. *Analysis and Concluding Findings*

The parties agree that a company must allow an employee to be represented by his union during interview which he reasonably believes could lead to disciplinary action. *NLRB v. J. Weingarten*, 420 U.S. 251 (1975). However, as noted by counsel for the Respondent, this right is triggered only by the employee's request, and cannot interfere with legitimate employer perogatives. Further, under *Weingarten*, an employee who is merely being interviewed without some reasonable expectation that the investigation could lead to his discipline has no right of representation.

The request need not be in any particular form, so long as the company is put on notice by the employee that he wants representation. *Southwestern Bell Telephone Co.*, 227 NLRB 1223 (1977). And once the request is made, it need not be repeated. *Consolidated Freightways Corp. of Delaware*, 264 NLRB 541 (1982).

Thus for the *Weingarten* right to attach, the employee being interviewed must reasonably expect that a result of the investigation will be his discipline and he must ask for representation. Then the company representative can determine whether to grant the request, or to forego interviewing the employee, or to deny the request and give the employee the opportunity to submit to the interview in any event.

The General Counsel alleges that just prior to the second trip to the sludge room, Luly requested the Union to represent him there and Brown declined. The Respondent contends that Luly never requested representation—that the only request was made by Moore, which was insufficient under *Weingarten*.

Though Brown claims that he was simply trying to get the facts until after the second sludge room meeting, it is clear from his testimony that at least by the end of the first trip to the sludge room he did not believe Luly. By this time, I conclude, Brown was inclined to believe that the accident was the result of some kind of horseplay. Therefore, Luly had become more than simply a witness to be interviewed but had become the target of potential discipline. And Luly reasonably knew of the potential for discipline since he had not been truthful with Brown and in fact had engaged in horseplay. If not before, by the time they returned to Brown's office the first time Luly's *Weingarten* right to be represented had attached.

Brown and Bognar testified that they then met with Luly another 45 minutes, during which Moore and Gant showed up outside the office. Luly, Moore, and Gant testified that Moore and Gant had arrived by the time Luly and Brown returned from the sludge room and they participated in the meeting. They were subsequently told by Brown that they could not represent Luly during the second trip to the sludge room.

The testimonial conflict between witnesses for the General Counsel and those for the Respondent is so stark than it can-

[1] All dates are in 1992, unless otherwise indicated.

[2] The errors in the transcript have been noted and corrected.

not be attributed to mistake or faulty memory. One side or the other did not tell the truth about whether Moore and Gant participated in the meeting as representatives of Luly. Further, this is critical in resolving whether Luly in fact requested representation. Standing alone, Luly's testimony is not particularly credible; but if Moore and Gant were at the second meeting in Brown's office, it would follow that their presence had been called for by Brown and this would confirm that Luly made the request.

The objective and uncontested evidence supports the testimony of Moore and Gant. Moore and Gant were employees who had to be released by their respective supervisors in order to do union business. In order to be released, someone has to notify the supervisor who then notifies the union representative. Someone contacted Uland Gladden (for Moore) and Bob Woolcott (for Gant) on the morning of June 18. Moore and Gant could not, and I find did not, act sua sponte. That they came to Brown's office lends credence to Luly's testimony that during the first meeting he requested union representation and Brown instructed Bognar to call the supervisors of Moore and Gant.[3]

Gladden and Woolcott are supervisors and therefore agents of the Respondent who could have confirmed or denied that they were contacted by Bognar and as a result released Moore and Gant. But they were not called as witnesses by the Respondent which raises the inference that their testimony would have been adverse to the Respondent's interest—namely, that they in fact were contacted by Bognar. *International Automated Machines*, 285 NLRB 1122 (1987).

Finally, the testimony of Moore and Gant is supported by a diary entry of June 18 made by Moore noting the meeting in Brown's office. Thus I credit Luly, Moore, and Gant, and discredit Brown and Bognar on the critical point of whether Moore and Gant participated in the meeting before the second trip to the sludge room. I find they were at the meeting for the purpose of representing Luly and they did so.

However, when Brown determined to return to the sludge room and have Luly demonstrate with a cart just how the injury occurred, the continued representation by Moore and Gant was disallowed.

Regardless of how expressed, clearly Luly sought union representation and that representation was forthcoming, with the knowledge and assent of the Respondent. He sought and had been granted representation by the Union, thus I need not resolve the conflict between him and Brown concerning whether he asked for representation at the outset.

It necessarily follows from the policy of *Weingarten* that once established, union representation of an employee cannot be summarily discontinued. Thus, when Brown cut off the representation before the second trip to the sludge room, he violated Luly's *Weingarten* right. Therefore, I conclude that by its act, the Respondent violated Section 8(a)(1) as alleged.

[3] Luly testified that early on June 18 he asked a fellow employee to contact the Union, a fact which I discount because there is no indication that a rank-and-file employee would be able to secure the release from work of union representatives.

REMEDY

Having concluded that the Respondent engaged in the unfair labor practice alleged, I shall recommend that it cease and desist therefrom and take certain appropriate affirmative action.

Where it has been established that a company violated an employee's *Weingarten* right, then the burden is on the company to show that the ultimate discipline was not based on information obtained during the unlawful interview. Though this issue was not addressed by the parties, from the entire record I conclude that Brown would have proceeded to discipline without regard to any information obtained at the second sludge room visit. Therefore, the remedy will not include expunging the discipline given Luly.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[4]

ORDER

The Respondent, E. I. DuPont de Nemours & Co., Buffalo, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Denying to an employee who is the target of an investigation which might lead to discipline his right to be represented on request by Buffalo Yerkes Union.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Post at its Tonawanda, New York facility, copies of the attached notice marked ''Appendix.''[5] Copies of the notice, on forms provided by the Regional Director for Region 3, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director in writing within 20 days from the date of this Order, what steps the Respondent has taken to comply.

[4] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[5] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''